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March 13, 2002

By Courier

Docket Management System
U.S. Dept of Transportation
Room PL-401,
499 Seventh Street SW
Washington D.C. 20590-0001

FRA-01-11068-17

Dear Sir/Madam:

Re: Docket Number FRA 2001-11068, Notice Number 1, 49 CFR Part 219, RIN 2130-AB39, Control of Alcohol and Drug Use: Proposed Application of Random Testing and Other Requirements to Employees of a Foreign Railroad Who are Based Outside the United States and Perform Train or Dispatching Service in the United States; Request for Comments on Even Broader Application of Rules and on Implementation Issues

During CN's appearance at the February 14, 2002 public hearing on this issue, the Railroad was asked to provide supplemental information for the Docket on a number of additional items. As contained in a subsequent memo from FRA dated February 22, 2002, these were (1) information on current cases challenging alcohol and drug testing in Canada, (2) data on hazardous material volumes on CN freight lines in US territory, (3) data on criminal prosecution of Canadian railroaders for substance related offences, (4) description on how CN enforces its zero tolerance policy, (5) number of CN safety-sensitive employees who use the railroad's employee assistance program, (6) memo on legal impediments to random testing if it occurred only in the US, (7) data on CN accidents in US territory for the past five years and the results of any post-accident, reasonable suspicion, or reasonable cause testing and (8) details on CN post-accident testing plan. In addition, although not referred to in the February 22, 2002 note, at the public hearing CN was asked to provide information on Rule G violations involving train crews.

For each of these items, we offer the following information:

Current D&A Challenges in Canada:

Attempts by employers to introduce drug and alcohol testing have been vigorously resisted by some employees and their unions and have been challenged by human rights organizations. These cases have consumed considerable resources of the Canadian Human Rights Tribunal, the Supreme Court of Canada and the Federal Court of Appeal as well as the various appeal courts in the Provinces. There is considerable arbitral jurisprudence in Canada as well. As information, CN encloses a copy of a paper dated November 1999 delivered as part of a Canadian Bar Association seminar on this topic. When read in conjunction with the Entrop decision of the Ontario Court of Appeal dated July 2000 (and discussed below), this paper provides an excellent overview of the challenges in Canada and summarizes the leading cases.

The most notable of these is the Martin Entrop vs. Imperial Oil case. This was referenced in our February 8, 2002 comments on the NPRM and in our representation at the public hearing, in which we stated that CN does not have random testing as part of its company policy for Canadian Employees due to the requirements of the Canadian Human Rights and added, "Although this has been modified by a recent Court of Appeals decision, it had not been tested in the railway context."

In a July 2000 decision, the Ontario Court of Appeal ruled that under specific circumstances, random alcohol testing for safety sensitive positions is not illegal.

A summary on the Ontario Human Rights Commission web site provides the following:

Entrop v. Imperial Oil - Ontario Court of Appeal Decision: July 21, 2000

> *Martin Entrop had been employed by Imperial Oil Limited for 18 years when the company's new "Alcohol and Drug Policy" came into effect. In accordance with the policy, Entrop was required to disclose that, some years before, he had had an alcohol problem. As a consequence of this forced disclosure, Entrop was removed from his safety-sensitive job to a less desirable job. He was later reinstated but found himself subjected to more rigorous management supervision*

than before his disclosure. He was also required to make frequent declarations as to his sobriety in order to keep his job. Entrop filed a complaint with the Commission alleging that he had been discriminated against on the basis of a handicap and that he had been subject to reprisal.

Result at Board of Inquiry: In a series of separate decisions, the Board made a number of rulings. The key decision was the Board's determination that the drug-testing programs employed by Imperial Oil had the effect of discriminating against persons who were substance abusers on the basis of their handicap or perceived handicap.

Result at the Court of Appeal: The Court held that in cases of adverse affect discrimination, the unified approach and the three-step test adopted by the Supreme Court of Canada in Meiorin should be applied. The three-step test requires that:

i. the rule is rationally justified;
ii. the rule is bona fide; and
iii. the standard is reasonably necessary to the accommodation of that legitimate work-related standard.

To succeed on the last step, an employer must prove that accommodation is impossible or will cause undue hardship.

The Court also confirmed that substance abuse is a handicap and thus the policy was prima facie discriminatory. The drug testing provision violated the Code because it could not accurately measure impairment. The Court held further that random alcohol testing would not satisfy the Meiorin test unless Imperial Oil took steps to accommodate those who tested positive, including less severe sanctions than dismissal and providing the necessary support to permit treatment. Finally, the Court held that the requirement of disclosure of a past abuse problem was unreasonable.

Current status: The decision was not appealed.

Of significance is that the decision does not address random drug testing, for which the link between presence in the body and impairment is not as well defined. It is also not based on the requirements of a transportation or railroad industry. The full text of the decision can be found at *http://www.ontariocourts.on.ca/decisions/2000/july/entrop.htm*

The implementation of mandatory drug and alcohol testing of commercial motor vehicle drivers pursuant to regulations of the U.S. Federal Highway Administration has also generated complaints, from Canadian-based drivers, to the Canadian Human Rights Commission. The Commission advises CN that random drug and alcohol testing of cross-border truckers has resulted in 6 complaints, three of which are still open.

Hazardous Material Information

As referred to in our submission and public hearing representation, there are 9 locations where CN Canadian-based train crews operate into the US.

The following table shows the annual (2001) volume of cars containing hazardous material handled by CN at these locations as well as the three most common commodity types. It should be noted that this data includes residue as well as loaded cars and is the total for trains traveling in both directions.

CN does not have access to data on hazmat material handled by other railways who may operate over any of these lines.

Location	Annual Volume (carloads)	Commodity 1	Commodity 2	Commodity 3
Rouses Point NY	23	Anhydrous Ammonia	---	---
Massena, NY	3117	Sulphuric Acid	Liquid Caustic Soda	Chlorine gas
St. Albans VT	5459	Distilled Fuel Oil	Propane gas	Gasoline NEC
Niagara Falls NY	5297	Cyclohexane	Petrol. Gasoline	Isobutane gas
Buffalo, NY	31537	Propane gas	Sulphuric acid	Isobutane gas
Port Huron, MI	91281	Sulphuric Acid	Petol. Gasoline	Vinyl Chloride
Ranier, MN	42253	Liquid sulphur	Butadiene	Vinyl Chloride
Noyes, MN	2054	Petro. gasoline	Liquid sulphur	Liquid Petrol. Asphal

Beaudette, MN	74110	Liquid Sulphur	Liquid Caustic Soda	Vinyl Chloride

Criminal Prosecutions

Under the Criminal Code of Canada it is an offence to operate railroad equipment while impaired by alcohol or drugs, or to have a blood alcohol concentration level greater than .08%. Police officers, including railway police officers, are entitled to test for the presence of alcohol using breathalyzer equipment on reasonable cause.

Penalties associated with this item in the Criminal Code include the possibility of fines and imprisonment.

A review of CN records show that over the past 5 years there have been four CN employees charged with this offence, one of which was a member of a train crew (Conductor). The others were Engineering or Mechanical employees operating on or off-track equipment.

Zero Tolerance Policy

In references to its Drug and Alcohol Policy for Canadian based employees, CN refers to the policy as having "zero tolerance".

CN uses the term to refer to the manner in which the policy is applied. That is, the railroad ensures that each aspect of the policy is handled in a consistent manner that is fully consistent with the written policy. There are no exceptions or cases of "looking the other way". In addition, there is zero tolerance given for confirmed violations.

CN ensures that this attitude is maintained though extensive training of supervisors and managers and a detailed information and education program for all employees.

CN strongly believes that such a zero tolerance application is necessary for the policy to have the desired effect on safety.

EFAP Participation

A major part of CN's Drug and Alcohol policy and program for Canadian based employees is its comprehensive Employee and Family Assistance Program (EFAP). The program provides counseling and services to employees and their families in a number of areas including drug and alcohol addiction.

CN believes that one of the tell-tale signs of the success of CN's Drug and Alcohol policy was the significant increase in D&A related cases when the policy came into effect in 1997.

In 2001, the EFAP program took on 1639 new cases. 77.4% of these (1269), were employees. The remainder were family members. Of the new cases involving employees, 7.1% (90) were related to drug and alcohol.

Although, due to confidentiality issues, CN's data cannot specifically determine the number of train crew employees in EFAP, we do know that 49% of the employees (622) are in positions that CN classifies as "risk sensitive" for its internal D&A policy. This would include a number of engineering track and signal maintenance employees and equipment inspection and repair employees in addition to train service employees. The % of Risk Sensitive employee cases involving D&A is also 7.1%

It should be noted that data provided in the last item of this submission, regarding train crew employees under D&A monitoring, also provides some information on the use of EFAP for detection of D&A problems.

Legal Impediments to Random Testing in US

As requested by FRA, CN has sought advice on the legal impediments to implementing random testing if it occurred only in the U.S. We are advised that, strictly speaking, there may be no legal impediments if the random testing were to be performed on U. S. soil.

That said, from a practical perspective, and given the limited nature of CN's cross-border operations at the subject locations, the prospect of implementing random testing would

create a number of obstacles. CN does not have the facilities to administer the tests on U.S. soil at the subject locations.

From a practical perspective, CN would have to perform the testing on the subject employees at terminals in Canada. That could create legal impediments related to the extra-territorial application of U.S. laws and regulations. Also, as indicated in CN's submission dated February 7, 2002, the implementation of random drug testing could lead to the possibility of Canadian train crews refusing to be tested or refusing to cross the border and having to be taken out of service, thus potentially tying up cross-border traffic and international trade. In many of the CN operations involving Canadian-based crews there is not sufficient infrastructure or resources to support alternatives using US-based crews. In any event, CN will undoubtedly be forced to incur considerable expense in defending human rights complaints in Canada. Even if CN could somehow implement the FRA testing in the strict absence of legal impediments, Canadian-based employees would not lose the ability to contest the matter before human rights tribunals in Canada.

Accident History in US

A review of CN's accident records show that over the past 5 years, Canadian based train crews have been involved in 13 accidents while in the U.S. Information on the accidents is contained in the following table:

Date	Location	Cause	Damage ($US)	FRA Reportable	Post-Accident Trigger
Nov. 13, 1997	Sprague sub (CN main track)	Mechanical - side bearings	$4800	No	No
July 27, 1998	Buffalo (Conrail main track)	Vandalism - object on track	$9200	Yes	No
Aug. 20, 1998	Massena (CN yard)	Transp. Employee error - switching rules	$1200	No	No
Aug. 23, 1998	Port Huron (CN yard)	Transp. Employee error - switching rules	$3500	No	No
Oct. 5, 1998	Port Huron (CN Yard)	Engineering - worn switch	$2500	No	No
Oct. 18, 1998	Massena (Conrail main track)	Vandalism - switch	$20400	Yes	No

Nov. 23, 1998	Buffalo (Conrail main track)	Misc - object fouling track	$700	No	No
June 15, 1999	Buffalo (CSX yard)	Transp. Employee error - derail	$350	No	No
May 9, 1999	Massena (CSX yard)	Transp. Employee error - switching rules	$2250	No	No
Sept. 28, 1999	Sprague sub (CN main track)	Mechanical - Burnt off journal	$8770	Yes	No
Jan. 13, 2000	Buffalo (SBRR yard)	Engineering - wide gauge	$2450	No	No
Sept. 15, 2001	Massena (CSX main track)	Engineering - broken frog	$1700	No	No
Sept 17, 2001	Massena (CSX yard)	Transp. Employee error - switching rules	$1100	No	No

As can be seen, although 3 of the accidents were FRA reportable, none of them triggered the mandatory post-accident D&A testing thresholds.

Of interest is the fact that the 3 reportable accidents in 5 years results in an equivalent FRA accident ratio of 1.5 accidents per Million train-miles. This compares favorably with the US Industry average of approx. 4.0 and CN's own overall ratio of 2.1 during that period.

During the 5 year period there was one situation of reasonable cause testing under company policy of a Canadian-based train crew operating in the US. This was a 3 person train crew that that was involved in a rule violation. One of the three employees, a yard helper, tested positive for cannabis.

Post-Accident Testing Plan

As referred to in our submission and public hearing representation, in 2002 CN plans on enhancing its Drug and Alcohol policy for Canadian-based employees by adding mandatory post-accident testing similar to that in place in the US.

This change is planned to take effect in the 3rd quarter of the year, coinciding with a reissuance of the policy and policy guidebook. Supervisor training will be carried out at that time.

Testing will be carried out after major accidents including those with property damage of $1.0 Million (US), fatality, or hazardous material spills resulting in evacuation or reportable injury. Train collision accidents would require testing when there is damage of $150,000 (US) or when there is damage exceeding the FRA reporting threshold along with an injury. Passenger train accidents would require testing when there is damage exceeding the FRA reporting threshold in addition to a reportable injury to any person. Crossing and trespass accidents, as well as those entirely due to natural causes or vandalism, would not require testing.

CN will test urine for the five major drugs referenced in FRA testing (THC (marijuana) , Cocaine, PCP, Opiates and Amphetamines). Analysis will be conducted at USDOT certified laboratories in Canada. CN will also administer breathalyzer tests using DOT certified equipment. Blood and tissue testing will not be conducted by CN, although an individual coroner would have this discretion.

Rule G Violations

In reviewing its records for the past 5 years, CN has determined that there has been only 1 Rule G violation involving a train crew member in Canada during this period. This involved a train conductor in the Toronto, Ontario area.

This is not surprising, in that Rule G is the last of a number of means of detecting drug and alcohol problems in employees. For instance, as mentioned in our submission and public hearing comments, CN has a "co-worker report" program in place known as the Rule G by-pass. In addition, CN is made aware of many D&A situations through medical assessments associated with back to work requirements or applications of employment benefits for short-term absence. As previously mentioned, the Railway also has a comprehensive EFAP program.

A review of employee information shows that over the past 3 years, CN has been monitoring, through unannounced tests, 54 Canadian train crew employees with D&A related problems. A breakdown of how the problems were detected shows the following:

Means of detection	Number
Referral to Occupational Health Services (OHS) from EFAP counselors	18
Medical condition known prior to 1990 (medical assessment)	12
OHS review of medical leave insurance application	10
Medical assessment - supervisory referral	7
Medical assessment - periodic	2
Rule G By-pass	2
Self referral	1
Reinstatement	1
Report of loss of drivers privilege	1

We trust that this information addresses the additional questions raised by the panel and will help in the review of CN's comments on the NPRM. Should there be any additional questions, please contact me at 514-399-4589.

Yours truly,

D. E. Watts
Director - Regulatory Affairs

attach.

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CANADIAN WORKPLACE PRIVACY RIGHTS -- ALCOHOL AND DRUG POLICY AND TESTING ISSUES

DEVELOPMENT, IMPLEMENTATION AND LEGAL OVERVIEW

Prepared for the:
Canadian Bar Association
Continuing Legal Education Seminar
Administrative and Labour Law Conference
Ottawa, Ontario
November 1999

Prepared by:

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Disclaimer

This paper is intended for general information only and does not constitute legal advice. This is an area where statutes and case law are rapidly changing. Before acting in this area, consult a lawyer familiar with the issues. The author is not liable for any reliance on the contents of this document.

1. INTRODUCTION

Workplace privacy rights have always involved a balancing of interests – a balance between the rights of the individual to privacy versus the need for the employer to have certain information available. Historically, Canadian legislative bodies have limited their intervention in this area. Federally, the *Privacy Act*[1] has applied to the government and crown corporation sectors, as has the *Access to Information Act*.[2] Provincially, only Quebec has enacted privacy legislation governing the relationship between corporations and individuals.[3] The development of the law in this area is ongoing. Bill C-54 (now Bill C-6) is currently moving through the federal legislative process. This *Personal Information Protection and Electronic Documents Act* will impose new obligations on federally-regulated employers in dealings with individuals. In many instances, the most profound impact will involve the relationship with employees. In addition, case law in this area is continually emerging.

There are many aspects of employer-employee relations concerned with privacy issues. The scope of this paper is limited to the admittedly narrow, but currently topical, area of alcohol and drug testing of employees.

Workplace alcohol and drug programs, in various forms, have been in place in Canada for over twenty-five years. Some have consisted solely of employee assistance programs, while others have been more comprehensive. Many such policies have included testing of employees for the presence of alcohol and other drugs for over a decade. While testing is not new, there continue to be legal challenges to an employer's right to request such tests. These cases are now moving through administrative tribunals and the courts.

This paper examines why workplace alcohol and drug programs are of interest to employers, considers recent case law on the subject, explores the constituent elements essential to any such policy and deals with a number of implementation issues parties should consider when making decisions about putting these programs in place.

2. REASONS TO ADDRESS THIS ISSUE

Of the many factors that can affect safety and productivity in the workplace, substance abuse is an important one that is presently receiving a good deal of attention. The workplace can provide a ready avenue for promotion of a healthy lifestyle, and with respect to alcohol and other drugs, it presents an opportunity for focused prevention initiatives as well as support for the successful recovery of those that have had problems. From another perspective, the use of alcohol and other drugs by employees can have considerable impact on work performance and present a serious safety risk in many jobs. In terms of operational integrity and maintaining the highest standards of occupational health and safety, any negative impacts associated with alcohol and drug use can not be ignored by employers.

There are a number of other important reasons to take action.

2.1. Health and Safety Concerns

Drug use and its impact on performance is receiving greater attention as information from scientific research, field studies and employee opinion surveys increases. Program evaluations are confirming the effectiveness of comprehensive policies in triggering a change in attitudes and practices, and reducing the negative effects of alcohol and drug use on performance, health and safety.

Various studies have credited alcohol and other drug use with contributing to increased turnover, accidents, absenteeism, workers compensation, sick benefits and insurance claims, loss of productivity and human potential, low quality products and services, theft and trafficking, as well as increased corporate liability regarding employee and public safety and the environmental impacts associated with accidents. Surveys across the country have found:[4]

- alcohol use is most prevalent; alcohol use is highest in managerial positions and heaviest in blue-collar ones;
- highest current users are found in financial, upstream oil, forestry/mining and construction industries;
- 10% of the labour force is in the heavy drinking category, with higher risk in the workplace;
- alcohol use and hangovers are responsible for the majority of negative effects;
- 8% of the labour force report they are current illicit drug users;

- highest levels of illicit drug use are in construction, transportation, upstream oil and forestry/mining industries; and
- cannabis is the most commonly used illicit drug and is perceived as having a negative impact in the workplace; use by Canadian adults is on the upswing.

2.2. *Legal Liabilities and Responsibilities*

A variety of associated legal issues can be addressed through consistent implementation of a clear and reasonable policy; this can include addressing the liabilities associated with the actions of impaired employees at work, due diligence responsibility around workplace safety, actions in response to possession or trafficking of illicit drugs, and the duty to accommodate those with a chemical dependency in accordance with human rights provisions. For example, when deciding whether to introduce a policy, and when designing the policy, employers need to consider the following.

2.2.1. Occupational Health and Safety Responsibilities

These place the onus on employers to ensure the health, safety and welfare of employees and prove diligence in minimizing potential safety risks, including those associated with the actions of contractors.

2.2.2. Employer Liability Issues

These are concerned with negligent or wrongful acts committed by an employee who acts within the scope of, or in the course of employment, including when driving a company vehicle. Of equal concern should be liabilities associated with their provision of alcohol to others or hosting alcohol-related events. In terms of hosting litigation, the most likely candidates are the provider of the alcohol, the occupier of the premises where the problem occurred and the sponsor of the event. As it becomes more common for employers to have policies concerning alcohol and drug use in the workplace, employers without such policies find that this lack may expose them to increased liability for lack of due diligence.

2.2.3. Conducting Searches

Although employers can perform searches of company property, care should be taken in the way in which they are conducted; employees should be notified in advance of the employer's right to search. Employers should ensure that any privacy rights and collective agreement provisions are respected.

2.2.4. Illness and Disability Issues

Employers need to balance liability and safety concerns associated with impaired performance with the protections provided by law for substance dependent individuals. Section 25 of the *Canadian Human Rights Act*[5] specifically states that disability includes previous or existing dependence on alcohol or a drug. It is generally recognized that even absent such specific wording in provincial legislation, a similar interpretation would hold in most provinces.

Employers may not limit employment opportunities for any individual on a prohibited ground of discrimination, however an action may not be considered discriminatory if it is based on a bona fide occupational requirement (BFOR). In this context, the concept concerns the ability of employees to perform the essential duties of the job without undue risk to themselves or others. Employers have the right to expect safe, efficient and reliable performance from their employees, while individuals have the right to be assessed and treated according to their capacity to provide such performance and to be provided accommodation by the employer to meet their needs, to the point of undue hardship.

2.3. Government Regulation

Canadian government officials have recently confirmed that they do not intend to introduce regulations requiring transportation companies to have substance use policies and programs at this time. However, U.S. government regulations have specific implications for Canadian companies with rail, truck and bus services operating cross-border. Recently, U.S. government authorities have renewed investigation of making cross-border requirements more stringent in railways. A brief review of the implications of U.S. regulations on Canadian motor carriers follows.

2.4. Corporate Requirements

Many U.S. parent companies are requesting that their Canadian subsidiaries develop alcohol and drug policies. The 1996 American Management Association survey[6] found that 81% of major U.S. firms test employees, applicants, or both for drug use; they report that the most effective programs combine testing with education, supervisor training and access to assistance.

2.5. Extension of Existing Programs

Many companies with employee assistance programs are recognizing the EAP does not set policy standards around drug and alcohol use, nor does it deal with deterrence measures, discipline, contractor provisions, hosting guidelines etc. Therefore, many companies are extending existing programs through a comprehensive policy.

2.6. Contractor Compliance

A number of the larger Canadian companies with strong policies expect the same level of diligence around drug and alcohol use as a condition of each contract. Their reason - court decisions clarifying occupational health and safety responsibilities extend to contracted workers.[7] Therefore, independent of any U.S. regulatory requirements, Canadian companies may find they need to introduce programs as a condition of doing business. Similarly, many U.S. companies are making it a requirement that any Canadian worker on their premises to operate, install or maintain equipment must be subject to a testing program prior to gaining access to the facility. Therefore, having a drug and alcohol policy that includes certain forms of testing is increasingly becoming a requirement of doing business on both sides of the border. Canadian companies should take care, however, since a recent case highlights the difficulty of introducing policies solely because of contractual imposition by others.[8]

3. U.S. GOVERNMENT REQUIREMENTS

The Federal Highway Administration (FHWA) regulates the motor carrier industry, and has implemented regulations requiring drug and alcohol testing of commercial motor vehicle drivers.[9] Employers are responsible for complying with the regulations, including the testing requirements, and can not use a driver in cross-border work who is unqualified or in violation of these rules. They

must maintain detailed records of their program, will be audited by FHWA with respect to compliance with the rules and will be fined up to $10,000 per infraction.

3.1. Application

The rules apply to everyone who operates a commercial motor vehicle in the United States and is subject to commercial drivers' license (CDL) requirements, including Canadian drivers dispatched into the United States. Commercial motor vehicles include those with a gross vehicle rating of 26,001 or more pounds, that are designed to transport 16 or more passengers (including the driver), or are of any size and placarded for the transportation of hazardous materials.

3.2. Standards

The regulations prohibit use of any alcohol when on duty, for four hours prior to duty, or for eight hours after certain accidents, and having a blood alcohol level of 0.02 or greater while on duty: 'on-duty" is tied to performing a safety sensitive function. The regulations prohibit any use of controlled substances (except where under the instruction of a licensed medical practitioner who advised there are no potential safety concerns), and having any banned substances in the body as confirmed by a positive test result. Separate regulations prohibit possession of beverage alcohol and controlled substances.

3.3. Consequences

The consequences of violation of the standards include immediate removal from safety sensitive service in all cases; if an alcohol test result is between 0.02 and 0.039 BAC, the offender must be off duty for at least 24 hours; if the test result is 0.04 or greater or positive for drugs, or the individual refuses to be tested, the driver is unqualified to drive into the United States. Specific conditions govern return to duty.

3.4. Testing Requirements

Testing for alcohol must be done using evidential breath testing devices by a trained technician, and in association with doing their safety sensitive job; testing for other drugs (marijuana, cocaine,

amphetamines, opiates and PCP) must be done at any time when on duty, and through urine specimen collection (split samples) and analysis by a certified laboratory with qualified medical review of results. Standards are stringent and companies will be fined for using unqualified service providers.

3.5. Testing Circumstances

Testing must be done prior to a driver performing safety sensitive functions, with reasonable suspicion of a rule violation, within a designated time period after certain triggering accidents, and on an unannounced random basis. Before a driver can return to duty after a rule violation, he/she must pass a return to duty test, and may be subject to unannounced follow-up testing for one to five years.

3.6. Prevention Initiatives

Drivers must be given a copy of the company policy, and information on internal procedures, available resources for the evaluation and treatment of any problems, and consequences for violations; the carrier is not required to pay for treatment or hold a job open for a driver. Supervisors who will make reasonable suspicion referrals must receive at least two hours of training.

4. LEGAL OVERVIEW – THE CANADIAN CONTEXT

Unlike in the U.S., there is no Canadian legislation dealing specifically with drug and alcohol programs involving testing – either mandating it, or prohibiting it. In addition, there has been no decision from the Supreme Court of Canada addressing the question. Cases from the lower courts and administrative tribunals have varied considerably. As a result, there remains some level of uncertainty in the Canadian legal environment concerning company alcohol and drug programs which do involve testing.

Workplace testing programs have been challenged through a variety of routes, although the two most common are a grievance or a complaint to a human rights commission. As a result, there have been a number of human rights tribunal, arbitration panel and lower court decisions from which one can detect emerging principles. This overview is intended to give a brief summary of a few of these

cases, from which certain key principles can be extracted. The reader should be cautioned that this paper focuses on the federal regime – there may be important distinctions under provincial acts.

4.1. Human Rights Cases

The *Canadian Human Rights Act*[10] prohibits discrimination in employment based on a disability.[11] It specifically includes a present or past dependency on alcohol or drugs as a disability.[12] As with most human rights acts, there is an exception for a *bona fide occupational requirement (bfor)*.[13] Case law originally introduced the concept of reasonable accommodation to the point of undue hardship.[14] However, with the changes introduced in Bill S-5 in 1998, the word "reasonable" was removed and undue hardship was restricted to considerations of health, safety and cost.[15] Further, the case law distinctions between adverse impact and direct discrimination were explicitly eliminated.[16] In the provincial context, a recent case from the Supreme Court of Canada similarly revisited previous cases and eliminated the adverse impact / direct dichotomy, thereby bringing all Canadian fora into the same context.[17] The reader should therefore read pre-1998 decisions with these changes in mind.

The Federal Human Rights Commission has stated that company programs must be developed based on individualized need. They have issued a policy on drug testing which states that employers would have to establish that drug testing is relevant to determining whether the individual has the capacity to perform the essential components of the job safely, efficiently and reliably; identify a drug free work place as a *bona fide* occupational requirement, most likely through a link to safety; demonstrate that testing is needed as an identification mechanism; and may, where reasonably possible, be required to avoid any discriminatory effect on the individual (i.e. reasonably accommodate the individual). Most provincial commissions have issued similar policies.

4.1.1. Toronto Dominion Case

In the federal context, the Toronto Dominion Bank case deals with some aspects of testing in the workplace. This case involved a new bank policy which mandated drug testing for each senior executive annually and for each new employee after acceptance of employment. In addition, existing employees could, for cause, be referred for a health assessment which could include a drug test. If employees were found to have a problem, they were given assistance and time off work for medical

reasons. They were subject to repeated testing during rehabilitation. If an employee failed to complete rehabilitation, failed further tests or refused to be tested, they were subject to dismissal.

The Human Rights Tribunal held[18] that dismissal in these circumstances was not dismissal for a disability, but rather for breach of a condition of employment. In the alternative, if it were discrimination, it was adverse effect discrimination giving rise to a need to accommodate. The Tribunal found that the Bank had made reasonable efforts to accommodate. The Tribunal went on to find that if they were wrong and it were direct discrimination, the policy would not be saved as there was no *bfor*.[19]

The Federal Court (Trial Division) overturned the Tribunal and ordered a new hearing.[20] In so doing, it held that the discrimination was adverse effect, and sent it back to the Tribunal to determine if there was a rational connection between the policy and job performance. While the Bank argued that trust, which is integral to the finance business, would be undermined if it allowed persistent drug users as employees, they were unable to argue that their employees were "safety sensitive" within the context of many employment situations involving drug and alcohol policies.

The Federal Court of Appeal rendered it's decision on July 23, 1998.[21] Robertson J.A. held that the policy was directly discriminatory as it had a direct effect on drug dependent people. He found that the Bank had failed to make out the *bona fide occupational requirement* defense required to justify direct discrimination. The Bank failed to show evidence of a drug problem in the workforce; they also failed to link illegal drug use and crime at the Bank. Further, they were unable to show that mandatory testing was the least intrusive reasonable method to assess job performance.

McDonald J.A. found that the policy was indirectly discriminatory, was not rationally connected to its objective and the Bank failed to prove that employee work performance was affected by drugs. To reasonably accommodate, Mr. Justice McDonald held that an employee could not be tested unless, after receiving treatment, there still existed legitimate concerns over job performance. As the policy was not tied to job performance concerns, the policy failed the duty to accommodate.

Finally, Chief Justice Isaac held, in dissent, that the policy was not discriminatory at all as it did not prevent someone from gaining or maintaining employment. Only those persistent drug users would be terminated. These individuals were, instead, breaching a condition of employment. As the *CHRA*

does not protect illegal use of drugs, only discriminatory practices on enumerated grounds such as dependence, the policy did not discriminate on a prohibited ground. Only employees who persisted in using illegal drugs risked dismissal, whether or not they were dependent. If there was some form of discrimination, Isaac C.J.A. found it to be indirect.

Thus, in a 2:1 decision, the Court of Appeal held that the Bank could not justify testing in the circumstances. It is interesting to note that Mr. Justice McDonald also said that, if instead this case dealt with a safety-sensitive industry, the duty to accommodate might not have had to consider job performance,[22] thus testing might be acceptable. Thus, 2 of the 3 justices likely would have upheld testing in the appropriate circumstances in safety-sensitive industries. Due to the changes to the *CHRA*, in the federal context the distinctions between adverse effect and direct discrimination dealt with in this decisions are now moot. Further, the only testing in question was, in effect, akin to pre-employment testing. Reasonable cause, post-accident / incident and pre-assignment into safety-sensitive position testing were not dealt with; nor was random.

4.1.2. Entrop Case

Like the TD case, the Entrop case,[23] heard under the *Ontario Human Rights Code*[24], at its heart deals with a restricted component of drug and alcohol testing in the workplace. The prime focus of the case was the requirement to disclose a past substance abuse problem and reassignment to another position pending assessment that Mr. Entrop was fit to return to a safety sensitive position. Adjudicator Backhouse did, however, expand her inquiry into the areas of random testing and also commented upon pre-employment, post-incident, for cause, certification and reinstatement testing.

The adjudicator determined that an employer has the right to ensure that its business operations are conducted safely, and a corresponding right to assess whether employees are incapable of performing their essential duties. For safety sensitive positions, Imperial Oil was also found to have the right to assess whether its employees are free from impairment on the job, whether by alcohol, drug abuse or otherwise. However, she went on to hold that a positive drug test does not prove impairment. Therefore, drug testing was held to be unlawful for pre-employment and random testing. She went on to say that drug testing might be upheld for cause, post-incident, for certification into safety sensitive positions and for post-reinstatement reasons, but only if testing is a one component of a larger process of assessment of abuse.

This case was appealed by Imperial Oil to the Ontario Divisional Court. In a ruling dated February 6, 1998[25] the Court decided that they would not interfere with the adjudicator's rulings. Leave to appeal was granted by the Ontario Court of Appeal[26] and the case has been argued, but to date, no decision has been rendered. In the meantime, on June 19, 1998 Imperial Oil received a stay of the Divisional Court judgment pending the appeal.[27] As a result, Imperial is able to continue testing.

4.1.3. The Niles Case[28]

Niles was a Canadian National Railway case involved a non-unionized employee who was an alcoholic. He was dismissed after an extensive period of absenteeism, unsatisfactory performance and repeated opportunities for rehabilitation (which he refused). The Canadian Human Rights Tribunal held that CN had discriminated against him through dismissal, and ordered him re-instated. At the Federal Court of Appeal level, the court found that CN had reasonably accommodated this individual, and his dismissal was upheld.

4.2. Arbitration Cases

While some collective agreements deal with issues of drug and alcohol abuse within the workplace, and assistance for those members with problems, the author is unaware of any Canadian collective agreements which make provision for testing in general.[29] Indeed, given the lack of jurisprudence in the area, and the debate over the use of testing, it is unlikely that any union would agree to such provisions. The typical arbitration therefore centres on the ability of the employer to impose a management rule dealing with testing of employees.

The seminal case relating to employer rules is *KVP*, dating from 1965.[30] Arbitrator Robinson decided that, while an employer had a management right to make rules, such rules must meet certain criteria to be valid under a collective agreement. The rule must not be inconsistent with the collective agreement; must not be unreasonable; must be clear and unequivocal; must be brought to the attention of the employee affected before the Company can act on it; the employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge; and such rule should have been consistently enforced by the Company from the time it was introduced. While each of these factors can be expected in an arbitration case,

the primary focus today in collective agreement arbitration of drug and alcohol policies is the reasonableness of the rule.

In considering the reasonableness of the rules in cases involving mandatory drug testing cases, arbitrators have generally used the *"balancing of interests"* tests.

4.2.1. CP Rail Case

In *Re Canadian Pacific Ltd. and United Transportation Union*[31] arbitrator Michel Picher was faced with the termination of a conductor at CP Rail who had been charged with cultivation and possession of 104 marijuana plants. The employee had been asked by CP to undergo a drug test and upon his refusal to do so was dismissed.

It was decided that the employee's refusal to submit to a drug test or to explain the incident merited dismissal, on the basis that the public's interest in safety outweighed his privacy rights. Picher ruled that the employer has a right to require an employee to undergo a fitness examination, including a drug test, when: the employer is a public carrier; the employee's duties are inherently safety sensitive; and the employer had reasonable grounds to believe that the employee may be impaired while on duty or subject to duty. He found that the condition must be seen as implicit in the contract of employment, absent any express provision to the contrary. In an oft-cited passage, the arbitrator explained his reasoning:

> What guidance do the foregoing considerations provide in the instance case? It appears to the arbitrator that a number of useful principles emerge. The first is that as an employer charged with the safe operation of a railroad, the company has a particular obligation to ensure that those employees responsible for the movement of trains perform their duties unimpaired by the effects of drugs. To that end the company must exert vigilance and may, where reasonable justification is demonstrated, require an employee to submit to a drug test. Any such test must, however, meet rigorous standards from the standpoint of the equipment, the procedure and the qualifications and care of the technician responsible for it. The result of a drug test is nothing more than a form of evidence. Like any evidence, its reliability is subject to challenge, and an employer seeking to rely on its results will, in any subsequent dispute, bear the burden of establishing, on the balance of probabilities, that the result is correct. The refusal by an employee to submit to such a test, in circumstances where the employer has reasonable and probable grounds to suspect drug use and risk of impairment, may leave the employee liable to removal from service. It is simply incompatible with the obligations of a public carrier to its

customers, employees and the public at large, to place any responsibility for the movement of trains in the hands of an employee whom it has reasonable grounds to suspect is either drug dependent or drug impaired. In addition to attracting discipline, the refusal of an employee to undergo a drug test in appropriate circumstances may leave that employee vulnerable to adverse inferences respecting his or her impairment or involvement with drugs at the time of the refusal. On the other hand, it is not within the legitimate business purposes of an employer, including a railroad, to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug testing. However, where good and sufficient grounds for administering a drug test do exist, the employee who refuses to submit to such a test does so at his or her own peril.[32]

4.2.2. Provincial-American Truck Transporters Case

The Re Provincial-American Truck Transporters and Teamsters Union[33] case concerned a union grievance against the company's policy requiring mandatory random drug testing. It should be noted that the collective agreement involved specifically gave the company the right to request medical examinations. Arbitrator Brent made an analogy between drug testing and employee searches since both compromise the right to privacy of the employees concerned. He cited extensively from Picher's decision, *supra*, on drug testing for cause. He refused to restrict the medical examination provision to the licensing examinations and interpreted it as being broad enough to allow drug and alcohol testing. The board then applied the "balancing of interests" test elaborated by the search jurisprudence to mandatory drug testing which it distinguishes from drug testing for cause:

> Accepting then that the search analogy is appropriate, and that the collective agreement here is broad enough to allow the company to make drug and alcohol testing part of a medical examination, what then is the result? If there is reason to demand a test, then a test can be demanded. That is, if a particular employee gives the company reasonable grounds for believing that his/her fitness to perform the job safely is impaired by use of alcohol or drugs, then the company should be able to test as part of its rights under art. 13. If mandatory universal testing is to be justified, absent a specific term allowing it, then there should at least be evidence of a drug and/or alcohol problem in the work-place which cannot be combated in some less invasive way. In this case we have no such evidence. As a consequence, it would not be a reasonable interpretation of art. 13 to give it a meaning which would allow such a serious intrusion into the off-duty conduct and privacy of the employees. Article 13 does not, in our view, generally waive the employees' right to privacy where there is no reasonable basis for demanding a drug test. Much clearer language would be required to do that. [34]

Applying this test to the particular facts of the case, the board found that the employer's policy was unreasonable (using the *KVP* test cited above) even accepting the obvious safety concerns and public duty, because the policy was promulgated prior to the US law which required it; in this particular case there was no evidence of any adverse impact on the company's operations by reason of substance abuse among employees, nor was there any evidence of problems regarding impaired drivers which were not being adequately addressed by the existing rules and regime of physical examinations. There was nothing to suggest that the existing method of certification by the physician that the employee was not addicted to alcohol or drugs was ineffective in keeping such drivers employed by the company off the road.[35]

4.2.3. Esso Petroleum Arbitration (Ioco) Case

This case, like the *Entrop* case above, involved Imperial Oil's policy which provides, amongst other things, for employees working in jobs determined to be safety sensitive to undergo random alcohol and drug testing, mandatory medical examinations, obligatory self-disclosure of present and past substance abuse problems and listed medications, and searches. The policy also provides for drug and alcohol testing for all employees for reasonable cause and after a significant accident.

The union filed a policy grievance contesting the implementation of the policy at the Ioco refinery near Vancouver. Arbitrator McAlpine stated that:

> The issues before the Board involve not only the civil rights of employees but also the employers justifiable interest in the safety of the work place. Those issues cannot be determined in a vacuum. The facts and circumstances including real evidence of a threat to the employees safety and the protection of the employer's property will necessarily shape the Board's decision. In our view, neither the managerial rights of the employer nor the rights of privacy of the employee are absolute. Realistically viewed this arbitration involves the balancing of interests.[36]

The board proceeded to analyze the drug testing precedents in Canada, and extracted the following principles :

> In summary, the arbitral decisions in Canada (in the context of safety-sensitive jobs) uphold drug testing where the conduct of an employee is such as to give reasonable grounds to the employer to conclude that the employee is impaired. The decisions also permit drug testing in the context of the reinstatement of an employee who has

> been dismissed for drug abuse. The decision of Mr. Picher in the second Canadian National Railway case underlines the limitations of drug testing as an indicia of impairment in the workplace.[37]

The Board found no evidence of a problem specific to that workplace, and thus refused to uphold Imperial's policy in total.[38]

Approaching the second part of the test (reasonableness) the board examined alternatives which were available to the company and concluded that certain measures were available to management and as yet untried such as the enactment of clear and unequivocal rules for the conduct of employees in the workplace, peer prevention programs, supervision and evaluation, performance testing and employee assistance programs. The Board found that alternative measures should have been attempted first by Imperial.[39]

Ultimately, the Board decided that the employer's defined scope of safety sensitive positions was not overly broad. It held that the rule applicable to all employees that prohibit the presence in the body of illicit drugs, unprescribed drugs or a blood alcohol concentration of 0.04% were not justified because there was no evidence that impairment might be in issue. The Board did however validate the reasonableness of the following rules: prohibitions against use, possession, distribution, offering or sale of illicit drugs or alcohol while on company premises for all; prohibition against intentional misuse of prescribed medications (...) while on company premises for all; prohibition against being unfit for scheduled work because of use of alcohol or illicit drugs for all; for employees in safety sensitive positions prohibition from consuming any alcoholic beverage during their working hours, whether on or off company premises (including mealtimes, breaks, paid or unpaid). For the board, mandatory testing of all employees on the basis of reasonable and probable cause and after a significant work accident, incident or near miss was acceptable.

Furthermore, the Board upheld the rule requiring candidates for and incumbents in safety sensitive positions to notify management if they have a current substance abuse problem[40] but eliminated the duty to declare a past abuse problem[41] and a past conviction[42] The Board confirmed the mandatory unannounced testing prescribed for safety sensitive employees in the context of rehabilitation[43] but it found that mandatory random testing prescribed for safety sensitive employees was unacceptable.[44]

4.2.4. CN Case

In 1998, Canadian National Railway dismissed an employee after he failed a positive drug test. The employee had been subject to a reinstatement contract, signed by the employee, the union and the company which prohibited the use of alcohol or illicit drugs and provided for unannounced testing. The employee tested positive for marijuana (THC) and was dismissed. This case is interesting in that it was the first Canadian case to deal with allegations that the reason for the positive test was 2nd hand marijuana smoke.[45] While the arbitrator held that there was "considerable reason to be concerned about the overall credibility" of the grievor's credibility,[46] there were also conclusions to be made about the scientific evidence adduced. Arbitrator Picher (who also heard the landmark CP case above) stated:

> It appears to the Arbitrator that, in the face of a positive drug test whose technical accuracy is not contested, there is a certain onus upon an individual who seeks to advance the defence of passive smoke inhalation. At a minimum, such a defence should contain an account of facts, preferably supported by competent medical opinion concerning the grievor's own physical condition, such as to bring the test results of the individual employee within some reasonable relationship with those positive tests encountered in the generally accepted clinical studies of passive inhalation of marijuana smoke. In making comparisons, it is important to appreciate that there are apparently no clinical studies which support the theory of a positive test for cannabinoids by passive inhalation in a ventilated setting.47

The dismissal was upheld.

4.2.5. Sarnia Cranes Case

Sarnia Cranes was a contractor to Imperial Oil in Ontario. Sarnia put in place an alcohol and drug policy, including testing, based solely on the instructions of Imperial and because, as a manager testified in a subsequent grievance, because they "thought it was a good idea".[48] This case, heard by the Ontario Labour Relations Board under the *Ontario Human Rights Code*, found all forms of testing to be unjustified.[49] Sarnia had no history of testing and only 2 anecdotal instances of alcohol problems within the workplace. There was no company evidence called on the issues of impairment / treatment / nature of the disease or policy development process. The union, on the other hand, called significant evidence on these issues.[50] Further, the company failed the *KVP* test since the risk of discipline / discharge was unclear and was not communicated to employees.[51] The Board held that Sarnia should have first considered less intrusive methods of problem detection,[52] if in fact there was

a problem to solve. The Board did state that since a drug test cannot measure impairment, testing itself is unreasonable under the *KVP* test.[53] As a result, all forms of testing were ruled inappropriate.[54]

However, given the facts in this case and the evidence the Board had before it, the case could hardly have been decided otherwise.

4.2.6. Procor Case

Contrary to the Sarnia case, in Procor the Alberta Board held that testing of an employee who was convicted of possession of marijuana was reasonable, even though Procor had no formal testing policy and had never previously tested any employee.[55] The grievor, Mr. Holden, was charged by police with possession and cultivation of marijuana. After a plea bargain, Mr. Holden was convicted of possession. Procor imposed a mandatory unnannounced testing program for 2 years. Mr. Holden grieved the imposition of testing, even though he agreed to undergo 3 tests (each of which were negative). The Board held that the employer was justified in requiring testing since the employee was in a safety sensitive position and had been in the possession of a substantial amount of marijuana (27 plants, plus hydroponic growing equipment). The Board held that:

> Except in the most safety sensitive of situations, or where the law requires it (and these may be one and the same), this does not give an employer the right to test employees at will. Reasonable and probable grounds must exist of an impairment risk...The value placed on our personal privacy generally outweighs the right to test simply because some employees, sometimes might be abusing alcohol or drugs and coming to work impaired. The balance tips however when an employer has good reason to suspect that the risk factor of impairment has been increased for an employee who occupies a safety sensitive position. Here the right to privacy may be outweighed by the need to protect the employee, his co-workers, the public and company property. Where the balance lies will be determined by the particular circumstances of each case...While accepting that urinalysis does not test for impairment, it is obvious that if the Grievor remains drug free, the risk of impairment at the workplace (at least with respect to drugs) is greatly reduced. This accomplishes the company's objective of reducing the risk of impairment to an acceptable level. The Board concludes that testing is reasonable in these circumstances.56

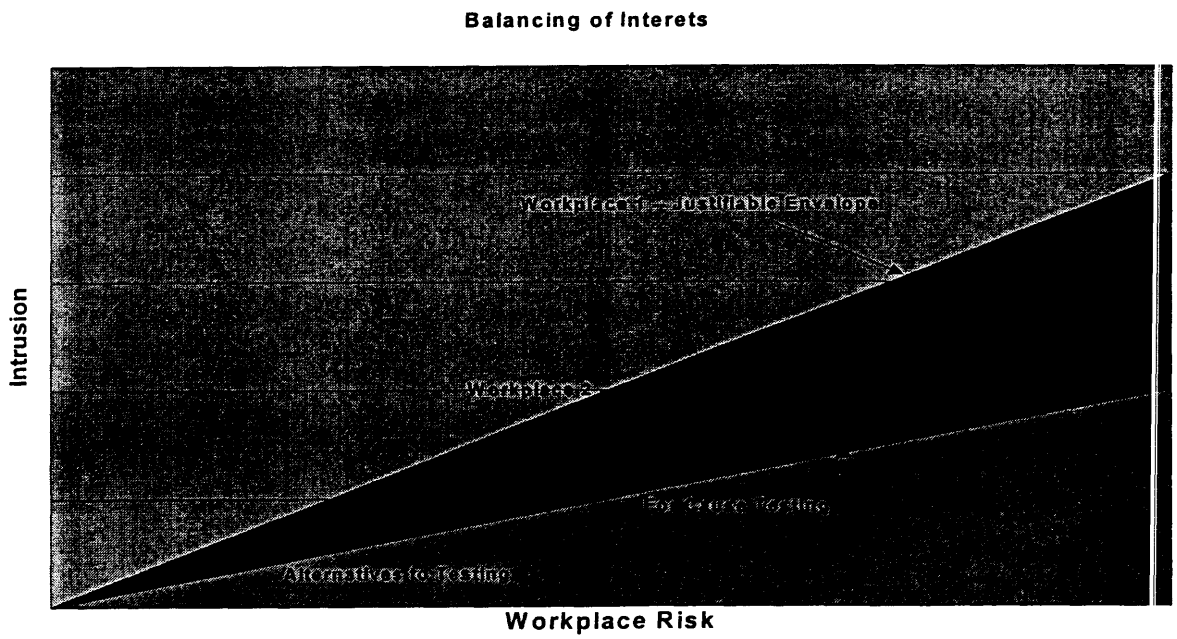
4.2.7. Ongoing Arbitration Cases

There are many ongoing arbitration cases concerning the validity of various components of workplace drug and alcohol policies involving testing. A number of these should be finalized over the next year.

4.3. Emerging Principles from Case Law

It is clear from the foregoing case law that courts, tribunals and arbitrators agree that there are legitimate interests to be balanced in Canadian cases involving drug and alcohol polices which include testing. On the one hand there is the right of the employee to not be subjected to unreasonable invasions of privacy, especially in cases of off-duty conduct. On the other hand, an employer has the right to expect unimpaired performance in the workplace, and has a duty to take all reasonable steps to ensure the safety of the public, the environment and co-workers.

This balancing of interests has lead to what might be seen as a graph of risk vs. degree of intrusion.



As level of risk in the workplace increases, increasingly intrusive measures may be justified. For example, it is possible that the full gamut of testing, including random, is justified in some workplaces, provided the risk is sufficiently great. Similarly, where workplace risk is low, it is possible that fewer forms of testing are justifiable (i.e. reasonable cause, post-treatment), or perhaps even no testing where there is insufficient evidence of a problem, but there might be increased reliance on other forms of monitoring policy compliance (ie. peer prevention, management supervision, etc.); at least until it has been shown that such measures have been tried and a continuing workplace drug or alcohol problem persists.

In safety sensitive workplaces, post-accident, reasonable cause, certification (into safety sensitive positions) and return to duty testing have generally been upheld. Random testing could well be allowable provided risk is sufficiently high and other methods of detection have proven inadequate. Pre-employment testing has received mixed reviews. Implementing a policy including testing without sufficient rationale (for example simply because another company so requires) will likely not be acceptable. In all cases, the employer must be prepared to show objective evidence of a problem and a subjective need for address it. Finally, in all cases employers must tailor a policy to the individual workplace; the problems therein and the collective bargaining regime in place.

4.4. Canadian Legislative Activity

As mentioned above, in 1998 Bill S-5 came into force, amending the *Criminal Code*, the *Canada Evidence Act* and the *Canadian Human Rights Act*. There are a number of resultant key changes to the *Canadian Human Rights Act* that may affect federally regulated corporations with alcohol and drug policies.

First, the revised *Act* specifically eliminates the distinction between adverse effect and direct discrimination[57] found in the earlier Supreme Court of Canada cases, *supra*. Next, it imposes an obligation on employers to accommodate to the point of undue hardship before one can reach the *bfor* criteria.[58] It should be noted that the word "reasonable", in the context of accommodation, is not included in the statute. Finally, in the last major change of import for the purposes of this paper, undue hardship is limited to considerations of health, safety and cost.[59]

Arguably, this eliminates the consideration contained in *Central Alberta Dairy Pool, supra,* of disruption of the collective agreement, problems of morale of other employees, interchangeability of workforce and facilities, size of the employer's operation.[60] Other cases expanded upon this list. *Central Alberta* specifically provided that the list was "not intended to be exhaustive and the results ... will necessarily vary from case to case".[61] Thus, at least some of the flexibility accorded by the courts has been eliminated.[62] Although there is a provision in the amendment to allow a regulatory definition of health, safety and cost, the legislators specifically considered and rejected, for the time being, establishment of any such regulation.

It remains to the courts and administrative tribunals to decide which components of the previous case law can be imported into the three criteria. Similarly they will be asked to decide the import of the elimination of the word "reasonable" in the context of accommodation. Finally they will be faced with the issue of whether *bfor* has any substantive meaning since it can only be invoked after all attempts at accommodation have reached the point of undue hardship.

From the perspective of federally-regulated employers with drug and alcohol policies, the accommodation bar has been raised.

In January 1999 Bill C-19 clarified and/or altered the powers of federally appointed arbitrators. There is now no question but that arbitrator's have complete authority to apply employment laws, as well as issue all remedies under legislative provisions relating thereto[63] even in the absence of collective agreement provisions granting such jurisdiction.

Also in January of this year, the Special Senate Committee on Transportation Safety and Security issued an Interim Report dealing with drug testing. The Committee recommended that "Transport Canada reconsider its position and we urge the government to proceed to permit mandatory, random drug and alcohol testing in the transportation industry similar to the United States legislation."[64] It remains to be seen if the government will act on this recommendation.

5. DEVELOPING A COMPANY POLICY[65]

Developing, communicating and implementing a well-considered policy is an important step in establishing a framework for decision-making and taking action to deal with workplace problems.

There is no "typical" policy or program, as each one will reflect the unique corporate culture and values of the company or organization, the fundamental aspects of the business it engages in, the regulatory environment within which it must operate, and most important, its specific program needs.

When developing a policy, companies should use an approach that best reflects their own unique policy development practices and history of employee/management relations. However, experience has shown that consultation with affected groups through the development process can result in a better policy with greater understanding and acceptance. The process does not need to be long or complex. It can be expedited if goals and objectives are clear, stakeholder expectations are clarified and addressed, a needs assessment is undertaken to ensure the policy that results directly responds to the company's specific requirements.

All policies, in their standards and implementation processes, should be sensitive to employees' rights of privacy, confidentiality and dignity. There are a number of key areas that policies must address, and several difficult decisions that will need to be tackled. At their core, company policies need to:

- be written down and broadly communicated to all employees;
- provide clear direction on the objective, application (people and circumstances) and standards that are to be met;
- outline the applicable rules and responsibilities;
- clarify avenues to access assistance and conditions for return to duty; and
- set out consequences for policy violation.

In addition, there are four fundamental cornerstones that underlie the various policy details:

- awareness and education programs;
- access to assistance, often through an internal or external employee assistance program;
- supervisor training on their role under the policy; and
- methods to identify individuals with a problem, or those who are in violation of the policy.

The most difficult decisions involve finding the appropriate **balance** between health and safety (due diligence), and respect for individual rights and privacy; this includes finding a balance between measures to control or deter use and prevention measures, while recognizing the needs of all stakeholders. They include:

- clarifying core **definitions and standards**, including company business and premises. Employee vs. contract worker, and rules/standards around alcohol, drug and medication use;
- whether to establish separate job categories and standards for **safety- or risk-sensitive** positions;
- whether to conduct **alcohol or drug testing**, with the related decisions of who to test, under what circumstances, which drugs, which technology, and what to do with the results;
- establishment of specific policies around the **social use of alcohol**, at company functions or in the course of doing work (e.g. hosting others);
- determining what policy standards can reasonably be expected of **contractors**, and how this will be enforced and monitored;
- procedures to be followed if an employee or contractor is **unfit for duty** and presents a safety risk to self or others;
- what rules/requirements will surround **loss of a driver's license** when the individual needs to drive to do their job;
- establishing circumstances and procedures for **searches**;
- determining conditions/provisions covering **return to duty** after treatment for all jobs, and in particular, appropriate monitoring programs for those returning to jobs where there is a higher degree of risk sensitivity; and
- deciding on appropriate **disciplinary actions** for policy violation.

6. IMPLEMENTATION ISSUES

Test issues are quickly coming to the forefront in Canadian workplaces as companies weigh the merits of including testing as a part of their overall alcohol and drug program. Testing in and of itself is not an alcohol and drug policy – programs should also include employee education, supervisor training and access to assistance services. In addition, testing is not always seen as an automatic requirement, and some companies have chosen not to conduct testing, or to include it only under certain circumstances. For example:

- some see it as a useful tool in a reasonable cause or post-accident situation to investigate whether an employee is in violation of the company policy;
- testing may also be used as a tool to monitor the successful recovery of individuals after treatment;
- where employment is continued after a policy violation, unannounced testing is often one of a series of return to duty conditions; and
- increasingly, pre-employment and random testing are being included in comprehensive programs, particularly where there is higher risk and the need to ensure individuals are fit to do their job safely.

Any employer considering including testing as part of a comprehensive approach to workplace alcohol and drug issues must determine which categories of jobs will be subject to testing, under what circumstances, which drugs will be tested for, which technology will be used, and what to do with the results (e.g. the consequences for testing positive or refusing to participate in the testing process). Implementing a testing program is not without controversy. Concerns have been raised about privacy issues, the accuracy of the technique used, the possibility of testing for other substances or conditions, the invasiveness of the procedure and the potential for misuse. Alternatively, many feel testing is a necessary part of a comprehensive program, to maximize safety, minimize liability, ensure individuals are fit to perform a particular job, and deter them from alcohol and drug use where it may impact the workplace.

The key is to ensure that employees have an avenue to get help if they have a problem before they fail a test. This is why testing, in and of itself, is not considered a complete program to address alcohol and drug problems. The prevention components of education, training and access to assistance, as well as good communication around the policy standards and expectations, and fair and consistent consequences for a violation, all must work together if workplace problems are to be successfully resolved.

In addition to the above, testing accuracy issues should also be taken into consideration.[66] The process to collect and analyze breath alcohol samples is fully accurate provided an Evidential Breath Testing Device is used by a fully trained breath alcohol technician (BAT). The science on which urine drug testing rests is equally solid provided the process is handled by trained collectors, there is

no break in the chain of custody, a screen positive is confirmed by GC/MS analysis and a qualified Medical Review Officer (MRO) reviews all lab positive results with the employee.

Although there has been considerable discussion about false positive test results (where a sample is reported to contain a drug that is not actually present above the cut-off level), possible errors in the sample analysis are eliminated through the two-stage screening process and regular calibration of equipment. In addition, the possibility of an employee successfully tampering with a sample is extremely limited because of a variety of checks a the collection and analysis stage. When professionally administered, the protocols and chain-of-custody procedures simply are not susceptible to tampering or deception.

Involving an independent MRO is critical to the process. The MRO makes the final decision on whether a positive result reported by the lab will be reported as positive to the company. He or she is a licensed physician responsible for receiving the laboratory results. The MRO must have knowledge of substance abuse disorders and appropriate medical training to interpret and evaluate a confirmed positive drug test. The MRO will contact the employee and discuss any alternative medical reasons for a positive result before reporting to the employer whether it is a true (verified) positive or a negative result. If all of the proper steps are followed, with qualified and experienced people handling them, the process is fully accurate.

Finally, there are a number of cautionary notes which should be considered by any company considering implementing or amending a drug and alcohol policy:

- do not copy another company's policy, or just pick and choose sections. They will have had specific reasons for their decisions which you will not be aware of, and therefore, will not be in a position to defend;

- do not import a U.S. policy, or simply extend a company's U.S. policy into Canada. The Canadian legal framework on this is significantly different, and it will be difficult to defend U.S. practices without looking at the policy from a Canadian perspective;

- ensure senior management understands the reasons for decisions taken, and can explain and defend them if questioned/challenged;

- ensure the company has completed and documented an assessment of why certain categories of jobs are considered risk or safety-sensitive, so that the additional expectations that may be placed on individuals holding these positions are justifiable;

- ensure the company has assessed why each circumstance for testing is justified, and documented their reasons for final decisions;

- understand what competitors, suppliers and customers are doing, and determine if you have sound reasons for any significant differences in approach;

- do not focus solely on safety or risk sensitive positions, or forget to set appropriate standards for contractors, but be aware that contractors may not have justification themselves;

- review any collective agreements to determine if there are any provisions that would affect the policy development process and policy decisions;

- extensive communications is essential; use a variety of vehicles to ensure employees and contractors know what is expected, and understand the consequences of a violation of the policy. This should be supported by education and training programs;

- there needs to be a priority placed on prevention initiatives, including access to appropriate assistance programs available to help with personal problems before they impact job performance;

- consequences should be fair and reasonable in light of policy objectives, past corporate practices and collective agreement requirements; they also need to be enforced consistently;

- only contract for testing services with qualified and experienced people; and finally

- get input from people who have experience in this area.

7. CONCLUSIONS

Every Canadian company that embarks on developing an alcohol and drug policy must decide what will work for them; there is no model policy. Importing U.S. programs, copying the policies of another company, or developing a narrow program simply in reaction to a regulation will not necessarily provide an effective solution. Each program should be tailored to meet the specific needs of each workplace, and should be a reasonable and responsible response to those stated needs.

The ultimate keys to success in addressing the problems associated with drug use in the workplace are prevention and the commitment of employees to achieving a workplace free of the negative effects of substance use.

The result should be an appropriate balance between health and safety, and respect for individual privacy. This means finding a balance between measures to control or deter use (including testing and discipline) and prevention measures (education, training, and employee assistance). Companies need to ensure they keep these considerations in mind as they make their program decisions.

Although the legal issues involving such programs remain some distance from final resolution, well-developed policies which balance the legitimate interests of all stakeholders are achievable now and are more likely to meet the ultimate legal litmus tests.

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[1] R.S.C. 1985, c.P-21

[2] R.S.C. 1985, c.A-1

[3] Act Respecting the Protection of Personal Information in the Private Sector, S.Q. 1993, c. 17

[4] "Canada's Alcohol and Other Drugs Survey 1994", Health Canada, Fall 1995; "Under the Influence", Dave Gower in Perspectives, Statistics Canada, Autumn 1990; "Substance Abuse and the Alberta Workplace: The Prevalence and Impacts of Alcohol and Other Drugs", Price Waterhouse for Alberta Alcohol and Drug Abuse Commission, January 1992; "Substance Use and the Workplace: Survey of Employees", Canadian Facts for Imperial Oil Limited, April 1991.

[5] R.S.C. 1985, c. H-6

[6] "Workplace Drug Testing and Drug Abuse Policies", 1996 American Management Association Survey (Self Published).

[7] For example, see *R.* v. *Wyssen* (1992) , 10 O.R. (3d) 193 (C.A.)

[8] *International Union of Operating Engineers, Local 793* v. *Sarnia Cranes Limited*

[9] Federal Motor Carrier Safety Regulations. Title 49 Code of Federal Regulations, Parts 40 and 382, U.S. Department of Transportation, Federal Highway Administration.

[10] R.S.C. 1985, c. H-6

[11] ss.3, 15

[12] s.25

[13] s.15

[14] For example, see *O'Malley* v. *Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Renaud* v. *Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970; *Chambly (Commission scolaire régionale)* c. *Bergevin*, [1994] 2 S.C.R. 525; *Central Alberta Dairy Pool* v. *Alberta(Human Rights Commission)*, [1990] 2 S.C.R. 489

[15] New *CHRA*, s.15(2)

[16] New *CHRA* s.15(8)

[17] B.C.(P.S.E.R.C.) v. B.C.G.S.E.U., SCC, Sept. 9, 1999 [not yet reported]

[18] 6 C.C.E.L. (2d) 196.

[19] Note that the tribunal and trial decisions were rendered before Bill S-5; the Court of Appeal arguments were made prior to S-5, therefore the final C.A. decision did not consider S-5, even though rendered after S-5 was proclaimed.

[20] 22 C.C.E.L. (2d) 229.

[21] (1998) 163 D.L.R. (4th) 193

[22] para 38

[23] There were a series of human rights adjudication decisions in this case, culminating in *Ontario Human Rights Commission and Martin Entrop* v. *Imperial Oil Ltd.*, Ontario Human Rights Tribunal, September 12, 1996 (24 C.C.E.L. (2d) 122).

[24] R.S.O. 1990, c. H.19

[25] Imperial Oil Ltd. v. Ontario (Human Rights Commission) (re Entrop) [1998] O.J. 422 (Div. Ct.)

[26] [1998] O.J. 1927, May 12, 1998. (C.A.)

[27] Oral ruling by Justice Borin, from the bench, not yet reported.

[28] *Niles* v. *Canadian National Railway Co.*, 94 D.L.R. (4th) 33, F.C.A., July 2, 1992

[29] The one exception is the common practice of reinstatement contracts which allow a worker to return to the workplace after successful treatment for a substance abuse problem. A standard provision includes the

requirement for the worker to undergo unannounced testing over a period of time as a means to monitor compliance with specific provisions dealing with abstinence. These contracts are generally signed by the worker, the collective bargaining agent and the employer, and thus may be considered a form of collective agreement.

[30] *Re Lumber & Sawmill Workers', Local 2537* and *KVP Co.* (1965) 16 L.A.C. 73

[31] (1987) 31 L.A.C. (3rd) 179

[32] pp. 186-87

[33] (1991) 18 L.A.C. (4th) 412

[34] p. 425

[35] *Ibid.*

[36] pp.24-25

[37] p. 35

[38] p. 41

[39] p.48

[40] pp.60, 67

[41] *Ibid.*

[42] p.54

[43] p.66

[44] p.67

[45] Re Canadian National Railway Co. and Brotherhood of Maintenance of Way Employees (Ouellette), 75 L.A.C. (4th) 300

[46] p.309

[47] p.313

[48] para. 56

[49] OLRB Decision 3123-97-G, *International Union of Operating Engineers, Local 793 and Sarnia Cranes Limited*, (Shouldice, Knight & McMeneny), May 4, 1999

[50] paras 108 - 151

[51] para 179

[52] para 213

[53] parras 173, 177

[54] para 229

[55] *Procor Sulphur Services and Communications, Entergy, and Paperworkers, Local 57 (Holden Grievance)* [1998] A.G.A.A. No. 106

[56] paras 24, 25

[57] s. 15(8)

[58] s.15(2)

[59] s.15(2)

[60] *Supra* at 439.

[61] *Ibid.*

[62] During consultation with the author leading up to presentations before the House of Commons and the Senate in consideration of this Bill, Justice officials stated that this was simply a codification of the existing case law and was not intended to alter *Central Alberta*. They stated that all factors included by the Supreme Court of Canada could be included within the three listed criteria. This seems a dubious proposition given normal statutory interpretation rules.

[63] s. 60(1)

[64] Recommendation #3

[65] For additional information on policy development refer to "Alcohol and Drugs in the Workplace:, Barbara Butler, Butterworths Canada Ltd., 1993, or "Developing a Company Alcohol and Drug Policy", Barabara Butler in Canadian Labour Law Journal, Volume 2, Number 4, Summer 1994, Butterworths-Lancaster House, or CLV Special Report, "Issues for Consideration when Introducing Employee Alcohol and Drug Testing" in The Drug Testing Controversy: Imperial Oil and Other Lessons", Barb Butler, Thompson Canada Limited 1997.

[66] For additional information on the testing process refer to Butler 1993 and 1997 and "Mandatory Guidelines for Federal Workplace Drug Testing Programs", U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Federal Register June 9, 1994.